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No. 91-1986

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRUMP TAJ MAHAL ASSOCIATES, et al.,

Petitioners,

—v.—

COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA S.p.A., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indirect ownership of shares of a corporate manufacturer by a political subdivision satisfies the requirements of 28 U.S.C. § 1603(b)(2)?

2. Whether the Court of Appeals properly affirmed the District Court's dismissal of this action brought by an employer seeking to recover damages for the wrongful death of its employees?

RULE 29.1 LIST

1. AGUSTA AEROSPACE CORPORATION is a wholly owned subsidiary of AGUSTA S.p.A.

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The Respondents, COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA S.p.A., AGUSTA S.p.A., GRUPPO AGUSTA and AGUSTA AEROSPACE CORPORATION (hereinafter Agusta defendants), respectfully request that the Court deny the petition for writ of certiorari, seeking review of the opinion and decision of the Court of Appeals for the Third Circuit affirming the District Court's denial of the motion to remand this action and the dismissal of this action for failure to state a claim upon which relief can be granted. That decision is reported, without published opinion, at 958 F.2d 365 (3d Cir. 1992) and is reprinted in the Appendix to the Petition.[1]

1 References to the Appendix to the Petition appear as "Pet. App."

STATEMENT OF THE CASE

1. The Nature of the Case

This action arises from the death of three passengers who were killed when an Agusta A109 helicopter crashed in Lacey Township, New Jersey on October 10, 1989. The action was commenced by three New Jersey partnerships who allegedly employed the decedents at the time of their death. Those partnerships, Trump Taj Mahal Associates, Trump Castle Associates and Trump Plaza Associates (hereinafter Trump) are engaged in the business of casino operations in Atlantic City, New Jersey.[2]

Trump filed a complaint in the Superior Court of New Jersey seeking to recover financial losses allegedly sustained as a consequence of the death of its employees. On August 10, 1990, Agusta S.p.A. filed a notice of removal to the United States District Court for the District of New Jersey based on Agusta S.p.A.'s status as a foreign state under the Foreign Sovereign Immunities Act (hereinafter FSIA). The Agusta defendants simultaneously filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. The Opinion of the District Court

In its opinion and order, dated April 11, 1991, the district court denied Trump's motion for remand holding that the Italian government owned Agusta S.p.A. in the manner contemplated by the FSIA (Pet. App. 19a-23a). In dismissing the common law claims for economic losses, the district court held:

> 1. Trump was asserting a wrongful death action and the New Jersey wrongful death statute precluded employers from recovering for financial losses sustained as a result

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2 A claim was also asserted by Helicopter Air Services, Inc. for diminution in the value of an unrelated Agusta A109 helicopter as a result of the accident.

of the loss of services of its employees (Pet. App. 47a-48a);

2. Only those beneficiaries enumerated under the New Jersey wrongful death statute were entitled to seek economic damages arising from wrongful death (Pet. App. 48a);

3. New Jersey common law does not confer upon employers a right of recovery for financial losses stemming from the death of their employees (Pet. App. 38a).

3. The Opinion of the Court of Appeals

Following oral argument and upon due consideration of the issues presented, the Third Circuit affirmed the decision of the district court in all respects. The court addressed the issue of whether the indirect ownership of the shares of the corporate aircraft manufacturer by the Italian government sanctioned removal of the action to federal court under the FSIA. The Third Circuit concluded this to be the case and also noted that the language and legislative history of 28 U.S.C. § 1441(d) demonstrated clear Congressional intent that the entire action be removed under the doctrine of pendent jurisdiction (Pet. App. 4a).

The Third Circuit also affirmed the decision of the District Court dismissing Trump's claims for economic losses on the grounds that an employer cannot recover for losses occasioned by the death of an employee. The court properly recognized that the language and purpose of the New Jersey wrongful statute was controlling as to those entitled to bring a claim for wrongful death (Pet. App. 5a).

A petition for rehearing was denied on March 12, 1992.

REASONS WHY THE PETITION SHOULD BE DENIED

There is no justifiable basis for the Court to grant this Petition for Certiorari. The Third Circuit, in holding that Agusta S.p.A. qualifies as a foreign state, reached a decision consistent with every federal court decision on this issue. As there is no conflict among the federal courts with respect to this issue, the standard of review by this Court has not been met and, therefore, the Petition should be denied.

Further, the Third Circuit conducted a *de novo* review all relevant authority and reached a determination as to how the Supreme Court of New Jersey would have ruled in this case. The Third Circuit conducted an appropriate review of the issues of state law and, therefore, there is nothing for this Court to review.

I

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR REMAND AND FOR STAY OF PROCEEDINGS

The decisions of the courts below finding that Agusta S.p.A. is a "foreign state" within the meaning of § 1603(b) of the Foreign Sovereign Immunities Act (FSIA) are entirely consistent with prior federal court decisions interpreting the language and intent of the statute and are amply supported by the undisputed facts of this case. The decisions relied upon by the courts below are not in conflict with any federal court decisions on this issue.

Petitioners do not dispute the chain of ownership between the Italian governmental agency, Ente Partecipazioni e Finanziamento Industria Manufatturiera (EFIM) and Agusta S.p.A. The purpose of EFIM is to own, manage, supervise and control business sectors essential to the national interest, including the aerospace industry.

In an attempt to create an issue of construction where none exists, petitioners seek to impose an artificially restrictive definition of "ownership interest." In that attempt, petitioners misstate the statutory language of 28 U.S.C. § 1603(b)(2). This section requires a majority ownership of shares or "other ownership interest." There is no requirement, implicit or otherwise, that the ownership be direct as petitioners contend.

Section 1603(b)(2) expressly recognizes alternate forms of ownership, a fact which is controlling on the issue of Agusta's status as a foreign state. The decisions addressing this provision, although few, are consistent and in keeping with the legislative history of the statute. In *O'Connell Machinery Co., Inc. v. M.V. "Americana"*, 734 F.2d 115 (2d Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984) the United States Court of Appeals for the Second Circuit found the legislative history which provides that political subdivisions were intended to include "all governmental units beneath the central government" to be controlling. *Id.* at 116 (citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6613).

Other courts have similarly construed the definition of "ownership interest" under section 1603(b)(2) as "designed to establish the degree of the foreign state's *identification* with the entity under consideration." *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852 (S.D.N.Y. 1978) (emphasis added); *see also Outbound Maritime Corp. v. P.T Indonesesian Consort.*, 582 F. Supp. 1136, 1144 (D. Md. 1984); *see e.g. Erickson v. Alitalie Linee Aeree Italiane*, No. 90-3895 (D.N.J. June 5, 1990). The quality of the relationship between the foreign state and the entities at issue was the controlling factor in each of these cases, not the question of direct ownership of shares.

Petitioners also attempt to blur the distinction between Agusta S.p.A.'s status as a foreign state and the issue of pendent jurisdiction. Petitioners argue that the Third Circuit has extended the FSIA to encompass the activities of Agusta

S.p.A.'s subsidiary, Agusta Aerospace Corporation. This is simply not the case nor have respondents so argued. As with any other defendants that do not qualify under the FSIA, Agusta Aerospace Corporation is entitled to have the claims against it heard in federal court under the doctrine of pendent jurisdiction.

As there is no conflict among the federal courts having interpreted the subject provision of the FSIA, there is no issue for the Court to review.

II

THE COURT OF APPEALS CONDUCTED A PROPER REVIEW OF THE DISTRICT COURT DECISION

Petitioners argue that since the Third Circuit was in agreement with the conclusions reached by the district court and chose not to write a duplicative opinion, that an appropriate review was not conducted. On the contrary, the standard of review applied by the Third Circuit in this case was in accordance with this Court's decision in *Salve Regina College v. Russell*, 111 S.Ct. 1217 (1991).

In *Salve Regina College*, the United States Court of Appeals for the First Circuit based its decision on the "customary deference" accorded by that court to interpretations of state law made by the federal judges of that state. 111 S.Ct. at 1120. It was this plain and explicit error in review which formed the basis for this Court's remand of that case for further proceedings.

No such deference was afforded by the Third Circuit to the issues of the state law presented in this case. The opinion of the Third Circuit in this case clearly indicates that a *de novo* review was conducted by the court:

> At the threshold, *we confront the question* of whether the removal of this action by a corporate aircraft manufacturer . . . was proper pursuant to 28 U.S.C. § 1441(d) (West

> Supp. 1991). If so, *we must also decide* whether the district court had pendent jurisdiction . . . *We conclude* that the Italian government's indirect ownership of Agusta S.p.A. sanctions removal from state to federal court.

(Pet. App. 4a) (emphasis added).

There are simply no grounds to support the petitioners' conclusion that the basis for the Third Circuit's decision was deference to the district court determination. Accordingly, there is nothing for the Court to review.

III

THE ISSUES OF STATE LAW WERE FULLY ADDRESSED AND DETERMINED BY THE COURT BELOW

It is the holding of *Erie Railroad Company v. Tompkins*, 58 S.Ct. 817 (1938) and its progeny that each federal court functions as a proxy for the state courts and therefore must apply the law as it conscientiously believes would have been applied by the highest court of the state. The ultimate goal is to achieve uniformity of result independent of whether a case is brought in state or in federal court. *See Guaranty Trust Co. of New York v. York*, 65 S.Ct. 1464, 1469-70 (1945). In affirming the decision of the district court, the Third Circuit thoroughly considered the relevant authority before it in this case and reached a decision based upon a proper application of the law of New Jersey.

Petitioners erroneously argue that the Third Circuit disregarded New Jersey Supreme Court decisions from 1914 and 1950 which they claim have remained undisturbed. Yet, as recently as 1981, it has been held by the Supreme Court of New Jersey that no action lies for the death of another except as provided in the New Jersey wrongful death statute. *Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857 (1981); *see also*

Cooper v. Shore Electric Co., 63 N.J.L. 558, 44 A. 633 (1899). The classes of beneficiaries specified in the New Jersey wrongful death statute are exclusive and the statute may not be expanded beyond its terms. *Turon v. J. & L. Construction Co.*, 8 N.J. 543, 86 A.2d 192 (1952). In the words of the New Jersey Supreme Court:

> A cause of action is created in favor of the persons thus designated, if there be none such, there can be no recovery. It is their pecuniary injury that is to be recompensed, not the loss suffered by the persons outside of the beneficiary class.
>
> * * *
>
> Being remedial in nature, the statute is to be liberally construed and applied to effectuate its beneficent object. . . *But the act is in derogation of the common law*; and the terms definitive of the persons or classes of persons for whom the remedy is provided are not to be expanded beyond their fair intendment.

86 A.2d at 199 (citations omitted and emphasis added).

The Third Circuit correctly determined that Trump, as the employer, was not a designated beneficiary and that the language and purpose of the New Jersey wrongful death statute was controlling on the issue of petitioners' wrongful death claim. The court's finding was also consistent with the decisions of every jurisdiction in this country which has considered the issue.

In reaching its decision, the Third Circuit carefully considered the authority cited by petitioners. However, it determined *Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N.J.L. 26, 90 A. 1062 (1914) was readily distinguishable as that case did not involve the wrongful *death* of an employee. The passing comment of the court with respect to an employer's right to recover for loss of services is no longer of any effect given the *Alfone* and *Turon* decisions and the language of the wrongful death statute.

The court also properly rejected *U.S. Casualty Co. v. Hercules Powder Co.*, 4 N.J. 157, 72 A.2d 190 (1950), as Trump did not have a breach of warranty right to assert in its own right. *Hercules* does not stand, as petitioners suggest, for the proposition that an employer has an unfettered right to recover economic losses for injuries sustained by its employees.

Petitioners attempt to convince the Court that there is a conflict among the decisions in New Jersey on the issue of an employer's right to recover for the wrongful death of its employees. This is simply not the case as amply demonstrated to the lower courts. The Third Circuit reached the only conclusion supported by the relevant authority and pleadings before it and correctly dismissed petitioners' claim for wrongful death.

As a last alternative, petitioners argue that the Third Circuit failed to give proper credence to intermediate court decisions regarding Trump's claim for reimbursement of worker's compensation benefits. This argument is premised, however, upon a misstatement of the holdings in those cases. In each case, written notice was given within the statutorily prescribed period.

IV

THE COURT FOUND AMPLE BASIS ON WHICH TO BASE ITS DECISION THAT AN EMPLOYER CANNOT RECOVER FOR THE WRONGFUL DEATH OF AN EMPLOYEE

Petitioners erroneously argue that the Third Circuit had inadequate grounds upon which to base its decision and, therefore, the matter should have been remitted to the state court. This assertion is wholly unsubstantiated as discussed more fully above and ignores the language and purpose of the FSIA.

In enacting the FSIA, Congress codified its intent that a foreign state be entitled to have claims against it heard in a federal forum. The alternative suggested by petitioners would require this Court disregard this intent and strip a foreign state of this statutory right. Further, federal courts are duty bound under the holding of *Erie* to decide, not evade, questions of state law. *Huddleston v. Dwyer*, 64 S.Ct. 1015, 1017-18 (1944).

Given these factors, the Third Circuit has carried out its duty in making a determination that an employer has no right to assert a common law claim for wrongful death in New Jersey. To have done otherwise in light of the clear authority presented to the court would have constituted a dereliction of its responsibility.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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